No. 99-185

(3)

Supreme Court, U.S.
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In The

Supreme Court of the United States

JOHN P. MEINHARDT, for himself and all others similarly situated, *et al.*,

Petitioners,

v.

UNISYS CORPORATION, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

REASONS FOR GRANTING THE WRIT 1

I. SHOULD THERE BE A UNIFORM STANDARD OF REVIEW FOR MIXED QUESTIONS OF LAW AND FACT? 1

II. SHOULD THE RELIABILITY, FIT AND QUALIFICATIONS REQUIREMENTS FOR EXPERT WITNESSES APPLY DIFFERENTLY IN NON-JURY TRIALS? 6

CONCLUSION 9

TABLE OF AUTHORITIES

Page

CASES

Anderson v. City of Bessemer City, 470 U.S. 564 (1985) 2

Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990) 4

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) 6

Kumho Tire Company Ltd. v. Carmichael, ___ U.S. ___, 119 S. Ct. 1167 (1999) 6

Miller v. Fenton, 474 U.S. 104 (1985) 3, 4

Ornelas v. United States, 517 U.S. 690 (1996) 3

Pierce v. Underwood, 487 U.S. 552 (1988) 4

Pullman-Standard v. Swint, 456 U.S. 273 (1982) 2

Salve Regina College v. Russell, 499 U.S. 225 (1991) .. 2, 3, 4

OTHER AUTHORITIES

H.R. Rep. No. 533, 93d Cong. 2d Sess. (1974), *reprinted in*, 1974 U.S. Code, Cong. & Admin. News 4639 3

REASONS FOR GRANTING THE WRIT

I.

SHOULD THERE BE A UNIFORM STANDARD OF REVIEW FOR MIXED QUESTIONS OF LAW AND FACT?

Respondents misapprehend the Participants' position on the standard of review in several respects. Petitioners contend that there should be a uniform standard of review for mixed questions of law and fact, at least in ERISA cases, rather than the current situation in which the courts of appeals conflict on the appropriate approach to addressing mixed questions. The fact that different circuits apply different levels of scrutiny to mixed questions means that inconsistent decisions arise on similar questions and that inconsistent decisions will potentially arise in the context of a single employer's plans. This is fundamentally inconsistent with the uniform federal common law that Congress sought to establish in enacting ERISA; at a minimum, the courts of appeals should be approaching the resolution of mixed questions in ERISA cases in a uniform way. Since Congress sought to establish federal common law governing employee benefit plans and indicated that federal standards were necessary to establish uniformity, Petitioners also believe that the application of *de novo* review to mixed questions in ERISA cases is warranted. The Court, however, need not accept Petitioners' view of the merits to decide to grant the writ: the courts of appeals presently apply varying approaches to mixed questions in ERISA cases, and any decision by this Court that established a uniform standard of review would foster greater uniformity in the way that the courts of appeals address those questions.

Respondents misapprehend the definition of a mixed question, leading them to conclude that the Participants are arguing for *de novo* review of matters of historical fact in suggesting that *de novo* review is appropriate to mixed questions. (Brief in Opp. at 1). But mixed questions are not questions of historical fact, they are "questions in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated." *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982). Application of *de novo* review in that context does not make district court trials irrelevant or burden courts of appeals. It preserves the appellate court's role in developing sound precedent while respecting the trial court's role in determining historical fact. *See Salve Regina College v. Russell*, 499 U.S. 225, 232 (1991) (describing relative strength of appellate courts in developing precedent); *Anderson v. City of Bessemer City*, 470 U.S. 564, 577 (1985) (describing expertise of district courts in addressing matters of historical fact).

Further, Respondents misapprehend how legal principles develop in a common law system. Petitioners' suggestion that *de novo* review is appropriate for mixed questions arising in federal common law cases does not rest on a belief that these cases are presently susceptible to disposition on the basis of static legal rules, as Respondents suggest. It rests instead on the premise that, over time, the process of assessing particular patterns of historical fact to determine whether the relevant statutory standard is or is not met will provide substantive content

to the governing standards, as Congress intended.[1] And it rests on the premise that *de novo* review will assure that cases with similar facts yield similar results, as Congress intended.[2]

Respondents also misapprehend the implications of *Salve Regina v. Russell,* leading them to assert that Petitioners' analysis of the standard of review for mixed questions conflicts with language from the Court's decision there:

> we have held that deferential review of mixed questions of law and fact is warranted when it appears that the district court is "better positioned" to decide the issue in question or that probing appellate scrutiny will not contribute to the clarity of legal doctrine.

499 U.S. at 223 (citations omitted). An examination of the authorities relied on by the Court demonstrates that Respondents misread this passage from *Salve Regina.* The first citation is from *Miller v. Fenton,* 474 U.S. 104, 114

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[1] *See Ornelas v. United States,* 517 U.S. 690, 697-98 (1996) (independent review of mixed questions required to permit appellate courts to maintain control over development of legal doctrine where doctrine develops content only through application); H.R. Rep. No. 533, 93d Cong. 2d Sess. (1974), *reprinted in,* 1974 U.S. Code, Cong. & Admin. News 4639, 4650 (describing anticipated role of the federal courts in developing fiduciary standards under ERISA).

[2] *See Ornelas v. United States,* 517 U.S. 690, 697 (1996) (*de novo* review necessary to assure uniform treatment of factually similar cases); H.R. Rep. No. 533, 93d Cong. 2d Sess. (1974), *reprinted in,* 1974 U.S. Code, Cong. & Admin. News 4639, 4650 (noting that ERISA was passed to bring greater uniformity to fiduciary standards).

(1985), which states that "[w]hen, for example, the issue involves the credibility of witnesses and therefore turns largely on an evaluation of demeanor, there are compelling and familiar justifications for leaving the process of applying law to fact to the trial court and according its determinations presumptive weight." 474 U.S. at 114 (citations omitted). Thus, the *Miller* Court noted with approval the traditional rule in *habeus corpus* cases that the state trial judge is in the best position to assess juror bias. *Id.* The remaining cases cited in this passage from *Salve Regina* all involve situations that touch upon the district court's traditional role in supervising litigation: *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 402 (1990) (adequacy of counsel's investigation under Rule 11 of the Federal Rules of Civil Procedure); *Pierce v. Underwood*, 487 U.S. 552, 562 (1988) (existence of substantial justification for government's litigation position). Against this background, *Salve Regina* does not compel the conclusion that evaluation of mixed questions in federal common law cases should be deferential, nor does it support Respondents' contention that the courts of appeals are required to eschew uniformity in their approach to mixed questions in ERISA cases.

In an effort to distract attention from the significance of the question presented, Respondents assert that the proper standard is irrelevant here since the evidence supporting their position was "overwhelming."[3] Yet even

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[3] Respondents omit significant facts from their presentation of the record. While they tout the Best's rating for Executive Life (Brief in Opp. at 3), they gloss over the testimony of their consultant that "AM Best was too generous in its

under a clearly erroneous standard, Chief Judge Becker characterized the soundness of the district court's ruling on prudence as "an exceedingly close question." (App. at 64) (Becker, C.J., dissenting). In the same vein, Respondents note that the district court determined that Petitioners had not suffered damages. (Brief in Opp. at 6). The court of appeals did not address the validity of this determination. Instead, the Third Circuit rejected one premise of the district court's ruling, holding that income received from investments that were not challenged could not be considered in assessing damages, while indicating that no claim for damages could be sustained because no breach of fiduciary duty had been proven. (App. at 32-33). Moreover, the actual level of interest received on the Executive Life contracts was below the rates prevailing for lower risk Treasury securities at the time the contracts were acquired (Supp. App. at 1-6), and the actual returns on the Executive Life contracts were dramatically lower than the rates offered by the lowest bid at any duration on the date the contracts were placed. (Supp. App. at 7-8).

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ratings." Joint Appendix at A00516, *In re Unisys Sav. Plan Litig.*, 173 F.3d 145 (3d Cir. 1999). Similarly, while Respondents laud the AAA rating of Executive Life from Standard & Poors, they ignore the fact that Executive Life had a notably lower A3 rating from Moodys at the time the contracts were acquired. This rating was an indication that "factors giving security to punctual payment of policyholder obligations are considered adequate but *elements may be present which suggest a susceptibility to impairment sometime in the future.*" *Id.* at A01730 (emphasis added).

II.

SHOULD THE RELIABILITY, FIT AND QUALIFICATIONS REQUIREMENTS FOR EXPERT WITNESSES APPLY DIFFERENTLY IN NON-JURY TRIALS?

Respondents treat this issue as merely a question of whether a district court's findings of fact, made in its role as fact finder, are entitled to deference. The issues presented, however, relate to the permissible scope of the district court's role as a Rule 702 gatekeeper in a non-jury case. Respondents have not addressed the district judge's decision in this context. They are silent on the significant issues that support issuance of the writ: whether credibility findings are permissible in assessing reliability, qualifications and fit under *Daubert* and *Kumho Tire*, and whether a district judge may exclude expert testimony immediately following *voir dire* based on factors that go to the weight of the testimony rather than to its admissibility.

Respondents quote *Kumho Tire's* statement that the trial judge has broad latitude to determine whether *Daubert's* specific factors are reasonable measures of reliability in a particular case. (*See* Brief in Opp. at 25). The purpose of the Rule 702 inquiry is to enable the trial judge to determine whether the proffered expert's testimony has a reliable basis in the knowledge and experience of the relevant discipline. The inquiry, though flexible, must concern the witness's principles and methodology. The witness's personal credibility is not probative of his principles and methodology. (Petition at 20-22). The Third Circuit's determination to the contrary conflicts with *Daubert* and *Kumho Tire*.

Respondents assert repeatedly that Petitioners' expert, George Gottheimer, was "proven to be lying" during his *voir dire* testimony. Chief Judge Becker examined the trial record and concluded that "this so-called 'impeachment' involved at most minor inconsistencies." (App. at 65) (Becker, C.J., dissenting).[4] Respondents

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[4] Chief Judge Becker explained his analysis as follows:

> First, Dr. Gottheimer testified at trial that he could not recall having testified in court in a case involving a life insurance company, although he stated at his deposition three years earlier that twenty-four out of the twenty-five times he had testified in court involved property-casualty insurance companies. [citation omitted]. Second, although at his deposition he could not recall having done consulting work involving life insurance company solvency, he testified that he had been retained once before his deposition and several times after his deposition to do such consulting. [citation omitted]. Third, while he testified at trial that there were "some differences and there are also some similarities in the way" one analyzes life insurance as opposed to property-casualty insurance company solvency, in his deposition he agreed with Unisys's attorney that there were "fundamental differences." [citation omitted].
>
> I cannot see how these answers, under any reasonable reading, suggest that Dr. Gottheimer is a completely incredible witness. At most, they suggest that he could remember some things at his deposition that he could not at trial, and vice versa. Certainly, Dr. Gottheimer's statements at trial were not directly inconsistent with those in his deposition. A comparison of the statements does not raise an inference that Dr. Gottheimer was being evasive, let alone lying. * * *

(App. 65-66).

attempt to discredit Chief Judge Becker by charging that Gottheimer exhibited "profuse sweating and excessive hand wringing" during his *voir dire* testimony. (Brief in Opp. at 23 n.21). These invented "facts" are not of record and should therefore be ignored. Neither the Repondents' proposed findings of fact nor the district court's findings derived from them point to Gottheimer's demeanor as a reason for disbelieving him. Petitioners respectfully submit that an objective examination of the relevant testimony will validate Chief Judge Becker's conclusion. (*See* App. 180-183).

Respondents assert that Petitioners have overlooked the standard jury instruction that if a witness is shown to have lied about a material matter then the fact finder *may* distrust the witness's testimony in other respects and *may* reject all his of testimony *or give it such credibility as the fact finder may think it deserves.* (*See* Brief in Opp. at 24). Actually, this instruction supports Petitioners' argument, as it is permissive, allowing the fact finder to believe some or all of the witness's testimony, a decision that can only be made after hearing all of the testimony with an open mind.

CONCLUSION

For the reasons stated, certiorari should be granted.

Respectfully submitted,

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Supp. App. 1

United States District Court
for the Eastern District of Pennsylvania

* * *

[p. 37] George Strong – Direct Examination

Q Have you had occasion to look at these contracts in a way that would accommodate the time value of money?

A Oh, we did that as well.

Q Let me show you what's been marked for identification as Defendant's Exhibit 2664. It looks like the copies are a little hard to read. Perhaps you would describe what the chart is and also, both for the benefit of the Court and the record, tell us what percentages there are inside each of those little bars.

A I'd be happy to. The bars represent the magnitude of the internal rate of return, a statistic that measures the return on investment if you will of each of these GICs looked at as an asset individually, which again I don't think is probably fair. I don't think it's fair.

And it calculates that there was a positive return to the GIC 1238 of 5.56 percent, a positive return to GIC 1267 of 4.59, a positive return to GIC 1279 of 3.88 percent. So they all enjoyed some positive return.

Q So this Exhibit 2664 does account for the time value of money?

* * *

A I believe that's right.

Q And you made sure that the people working for you or working with you in conjunction with this case only relied on accurate data at that time, correct?

A I believe that's right.

Q Well, taking a look at the second page of Defendant's Exhibit 2627, can you tell me, please, sir, what was the 90 day T-bill rate in or about June of 1987?

A 90 days, June appears to be about 5.82 percent.

Q And that's an amount in excess of the internal rate of return that you calculated on the first contract. Is that correct, sir?

A That's correct.

Q Now, can you also tell from looking at the second page of what is Exhibit 2627 what the rate was for the five year Treasury security in or about June of 1987 –

A Sure. It's –

Q – when this first contract was placed?

A The schedule says 8.02.

Q Okay. Now, of course when the [sic] bought a GIC, they didn't buy a Treasury security, did they, sir?

A No, they didn't.

Q They bought a contract that was issued by a non-governmental agency, so there's a default risk attached to the contract. Is that right, sir?

[p. 47] A That's correct.

Q And of course as you understand the field of finance, a rational investor who assumes a default risk is going to want something over and above the amount of return that attached to a risk free investment, such as a T-bill or the eight percent five year Treasury. Is that correct?

A Yes, that's right. He will demand an expected premium.

Q And in addition, sir, if a financial instrument or a debt security has a burden attached to it with respect to liquidity, a rational investor would want to get some increment over and above the riskless rate to compensate for that, wouldn't he, sir?

A That – that has been also the predicate for a premium, an expected premium. That's right.

Q Okay. And in point of fact, sir – well, strike that. Let's go back to the graph that you have here of various interest rate trends on 2627. Just so the record is clear, the top graph – the top line is the Moody's triple-A corporate bond yield. Is that correct?

A That's correct.

Q And the dotted line that falls below that's the 30 year U.S. Treasury yield. Is that correct?

A I believe that's right.

Q And the one – looking at the left axis moving down, the next solid line is the five year U.S. Treasury yield. Is [p. 48] that correct?

A That's correct.

Q And the last dotted line further down is the 90 day U.S. Treasury. Is that correct?

A I believe that's right.

Q And when you prepared – had this graph prepared, you were not surprised, for example, to see the relationship between the 90 day T-bill and the five year T-bill, were you, or five year Treasury security?

A No. That there was a difference in yield between the two?

Q That's the question.

A No.

Q Absent an inverted yield curve, you would expect that as you go out under maturity spectrum, you'd get paid for them, compensated.

A Absent an inverted yield curve, you would expect that.

Q And looking at the graph, there wasn't an inverted yield curve in the period from 1987 to 1991, was there?

A Well, in the period of 1990, there appears to be a little bit of noise. One can't tell from this graph. But I don't – absent that particular possible exception, the answer is no.

Q Okay. Now as part of your engagement, did you ever figure out what period of time it actually took to get to the [p. 49] point with this first 36 million dollar contract that they got $36,000,000 out?

A I did not. You mean what moment in time they –

Q Yes.

A – broke through the 36 million dollar barrier, if you will?

Q That's right.

A No.

Q Okay. Do you know whether it was sure or – strike that. Do you know whether it took longer than five years?

A Offhand, I do not.

Q Now let's go to the second contract. That was the contract that was bid in December of '87. And you calculated an internal rate of return for that contract of 4.59 percent?

A That's correct.

Q Could you just, so I understand, tell me what the 90 day U.S. Treasury rate was in or about December 1987?

A 90 day in December of '87, it says here is about 5.73 percent.

Q And that's an amount in excess of the internal rate of return on this contract. Is that correct, sir?

A That's correct.

Q And that's for security that doesn't have the same risk characteristics as that contract. Is that correct, sir?

A Oh, that's true.

[p. 50] Q It has a default risk. Is that correct?

A It does.

Q It has a liquidity risk?

A It does.

Q Okay. And on December of '87, could you tell me, sir, please, what was the five year Treasury?

A I've got 8.33 percent.

Q And while you don't have it here before you, if there had been a seven year Treasury of that date, would you expect it to be higher or lower than the 8.33 percent?

A Absent inverted yield curve view, it expected to be slightly higher.

Q Okay. And let's just, to finish the exercise if we could, turn to the third contract, the one that was awarded in January of 1988 and went into the insurance contract fund. What was the 90 day Treasury rate in or about January 1988?

A January of 1988 says 5.85 percent.

Q Okay. And what was the five year Treasury?

A It was 7.76 percent.

Q And how about the – and of course, if there was a seven Treasury, you'd expect that to be higher than the 7.66 percent.

A I would.

Q Okay.

A Other things being equal, sure.

* * *

[Defendant's Exhibit 6] [Plaintiff's Exhibit 127]

UNISYS SAVINGS PLAN JANUARY 13, 1988 GIC BID SUMMARY OF BIDS RECEIVED

✓

BIDDER	2 YR	3 YR	4 YR	5 YR	6 YR	7 YR
AETNA	7.60	7.89	8.21	8.49	8.68	8.84
ALLSTATE			8.60	8.80	8.95	
BANKERS TRUST	8.21	8.53	8.73	8.84	8.89	8.94
CNA				8.80	8.85	8.90
CONFEDERATION LIFE				9.00		9.08
EXECUTIVE LIFE	7.95	8.52	9.05	*9.48**	9.57	9.70
GREAT WEST LIFE		8.03	8.37	8.55	8.71	8.83
HARTFORD LIFE	7.84	8.29	8.56	8.75	8.85	8.95
HOME LIFE	8.25	8.54	9.00	9.13		
MANUFACTURERS HANOVER				9.02	9.24	9.35
METROPOLITAN		8.26	8.56	8.71	8.86	9.02
MUTUAL OF NEW YORK				8.64		
NEW YORK LIFE		8.40	8.65	8.90	9.05	9.15
PACIFIC MUTUAL	8.10	9.31	9.60	8.83		
PAN AMERICAN		8.22	8.54	8.86		
PENN MUTUAL		8.27		8.82	8.99	
PRINCIPAL MUTUAL	7.93	8.21	8.53	8.80	9.08	9.31
PROVIDENT MUTUAL		8.26	8.58	8.79	8.90	9.05
PROVIDENT NATIONAL	7.62	7.87	8.10	8.23	8.33	8.43
PRUDENTIAL	8.15	8.42	8.70	8.91	9.10	9.19
SOUTHWESTERN LIFE	7.61	8.45	9.15	9.50	9.65	9.62
TRAVELERS			8.78	8.83	9.25	
UNION CENTRAL	8.19	8.56	8.83	9.09		
UNITED OMAHA	7.90	8.25	8.60	8.80	9.00	
WASHINGTON MUTUAL	8.55	8.79	8.96	9.02	9.09	9.23

NOTES: SOUTHWESTERN LIFE AND WASHINGTON MUTUAL BIDS WERE PASSED OVER FOR CREDIT REASONS. SOME BIDDERS WERE BIDDING FOR LESS THAN 100% OF EXPECTED CONTRIBUTIONS. SOME BIDS WERE SUBJECT TO CAPS AND FLOORS.

*Figures in italic are circled on original.

UNISYS SAVINGS PLAN — DECEMBER 2, 1987 GIC BID — SUMMARY OF BIDS RECEIVED

BIDDER	2 YR	2.5 YR	3 YR	3.5 YR	4 YR	4.5 YR	5 YR	5.5 YR	6 YR	7 YR
AETNA	7.71		7.97		8.27		8.56		8.71	8.86
ALLSTATE				8.75			9.10		9.30	9.50
EXECUTIVE LIFE [50%]			8.73		9.27		*9.75**		9.85	10.00
METROPOLITAN		8.06		8.47		8.69		8.89		
PACIFIC MUTUAL LIFE	7.95		8.20		8.50		9.00			
PAN AMERICAN LIFE									9.49	
PROVIDENT MUTUAL			8.16		8.47		8.78		9.16	9.36
PRUDENTIAL	7.76		6.07	8.25	8.36	8.49	8.54		8.78	8.89
SEAFIRST BANK [30%]	8.65		8.90		*9.15*		9.25		9.30	9.50
SOUTHWESTERN	7.30		8.25		8.59		9.15		9.25	9.40
STATE MUTUAL	8.21									
TRAVELERS [20%]					8.67	8.82	*9.15*			
UNION CENTRAL LIFE	8.27		8.63		8.88		9.14			

NOTES: SOME BIDDERS WERE BIDDING FOR LESS THAN 100% OF EXPECTED CONTRIBUTIONS.
SOME BIDS WERE SUBJECT TO CAPS AND FLOORS.

UNISYS SAVINGS PLAN — DECEMBER 9, 1987 GIC BID — SUMMARY OF BIDS RECEIVED

BIDDER	2 YR	2.5 YR	3 YR	3.5 YR	4 YR	4.5 YR	5 YR
AETNA			8.23		8.65		8.77
CNA			8.23		8.61		9.00
EXECUTIVE LIFE		8.23	8.47	8.76	9.06	9.23	*9.45* [*9.405*]
JOHN HANCOCK				8.60	8.70		8.80
METROPOLITAN	7.96	8.16	8.21				
MONY							8.78
MUTUAL BENEFIT LIFE			8.60	*8.88* [*8.87*]	8.95		9.11
PROVIDENT NATIONAL	7.75	8.02	8.37	8.59	8.73	8.88	*9.12* [*9.13*]
PRUDENTIAL	8.13	8.29	8.42	8.50			
STATE MUTUAL		8.44	8.57		8.60		

NOTES: SOME BIDDERS WERE BIDDING FOR LESS THAN 100% OF EXPECTED CONTRIBUTIONS.
SOME BIDS WERE SUBJECT TO CAPS AND FLOORS.

* Figures in italic are circled on original.